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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CHASE ANDREW PIZANA, Defendant and Appellant.	F075805 (Super. Ct. No. F16907705) **OPINION**

THE COURT

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan M. Skiles, Judge.

Kevin J. Lindsley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Ivan P. Marrs, and Cavan M. Cox II, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE DISSENTING OPINION

INTRODUCTION

Appellant Chase Andrew Pizana was found guilty of felony buying or receiving a stolen vehicle, pursuant to Penal Code[1] section 496d, and other offenses. Pizana contends that Proposition 47, and specifically section 490.2, petty theft, has added a component to section 496d so that a felony conviction under section 496d requires proof that the value of the vehicle exceeds $950. Alternatively, Pizana contends that failure to apply Proposition 47 to convictions under section 496d violates equal protection. We agree that Proposition 47 applies to section 496d, and remand the case for further proceedings consistent with this opinion. Because we agree Proposition 47 applies to section 496d convictions, we need not address Pizana's equal protection claim.

FACTUAL AND PROCEDURAL SUMMARY

Our recitation of facts focuses on those facts relevant to the issues raised in this appeal. In December 2016, Fresno County Sheriff's Office Detective John Capriola was working as part of a multi-agency task force specializing in the investigation of vehicle thefts. Capriola was contacted and asked to assist in the search for a subject wanted in connection with a shooting. Capriola saw the shooting suspect and Pizana leave an address on East Belmont Avenue. Capriola followed them, along with other units, but Capriola eventually returned to the East Belmont Avenue address.

Once inside the East Belmont address, Capriola found a motorcycle with a screwdriver forcefully jammed into the ignition. Capriola associated the screwdriver jammed into the ignition with the likelihood the vehicle was stolen. The license plate attached to the motorcycle did not match the Department of Motor Vehicle records.

Capriola was able to start the motorcycle by turning the screwdriver in the ignition. On a shelf near the motorcycle, he found a stack of papers bearing Pizana's

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[1] References to code sections are to the Penal Code unless otherwise specified.

name. In the only furnished bedroom in the residence, Capriola found more papers bearing Pizana's name. Another bedroom was not fully furnished and contained female clothing.

Pizana was located and arrested about a week later. Capriola interviewed Pizana and the interview was introduced into evidence at the trial. Pizana claimed he had been staying at the East Belmont address for about a month and did not know the motorcycle was stolen. He referred to himself as the "landlord." Capriola asked him why there was a motorcycle in his living room with a screwdriver in the ignition. Pizana responded, he did not know and "I forget."

Capriola asked what Pizana would think when he saw a motorcycle with a screwdriver in the ignition and Pizana responded, "Probably stolen." The motorcycle had been in the home "maybe a week." Pizana stated in his interview that "everything's hot right now" and there were "bikes" at another location, too.

Pizana did not call any defense witnesses or offer any evidence at trial. On March 23, 2017, the jury found Pizana guilty of multiple offenses, including one count of felony receipt of a stolen vehicle in violation of section 496d. Pizana admitted a prior strike and five prior prison terms.

At the May 19, 2017 sentencing hearing, the superior court deemed the section 496d conviction the principal offense and imposed the middle term of three years, doubled to six years because of the prior strike offense. The total term imposed for all offenses was 13 years four months.

Pizana filed a timely notice of appeal on June 8, 2017.

DISCUSSION

Pizana contends that Proposition 47, and specifically section 490.2, petty theft, has added a component to section 496d so that a felony conviction under section 496d requires proof that the value of the vehicle exceeds $950.[2] We agree.

Summary of Proposition 47

"Proposition 47 was passed by voters at the November 4, 2014, General Election, and took effect the following day. The measure's stated purpose was 'to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment,' while also ensuring 'that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed.' (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70 (Voter Information Guide).) To these ends, Proposition 47 redefined several common theft- and drug-related felonies as either misdemeanors or felonies, depending on the offender's criminal history. The redefined offenses include: shoplifting of property worth $950 or less (Pen. Code, § 459.5, subd. (a)); forgery of instruments worth $950 or less (Pen. Code, § 473, subd. (b)); fraud involving financial instruments worth $950 or less (Pen. Code, § 476a, subd. (b)); theft of, or receiving, property worth $950 or less (Pen. Code, §§ 490.2, subd. (a), 496, subd. (a)); petty theft with a prior theft-related conviction (Pen. Code, § 666, subd. (a)); and possession of a controlled substance (Health & Saf. Code, §§ 11350, subd. (a), 11377, subd. (a))." (*People v. DeHoyos* (2018) 4 Cal.5th 594, 597–598; accord, *People v. Martinez* (2018) 4 Cal.5th 647, 651–652 (*Martinez*).)

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[2] This issue is before the Supreme Court in *People v. Orozco* (2018) 24 Cal.App.5th 667 (*Orozco*), review granted August 15, 2018, S249495.

Proposition 47 provided for prospective changes to the law and for retrospective relief in the form of a petitioning process for those convicted and serving final sentences, or those who completed their sentences prior to the measure's passage. (§ 1170.18, subds. (a), (f); *People v. DeHoyos*, *supra*, 4 Cal.5th at pp. 597–598; *Martinez*, *supra*, 4 Cal.5th at p. 651.) The crimes in this case were committed after Proposition 47 was enacted and, therefore, we are concerned here with the prospective changes effected by the law. (*People v. Gutierrez* (2018) 20 Cal.App.5th 847, 855.)

Section 496d—Receiving Stolen Vehicle

Turning to Pizana's conviction under section 496d, Proposition 47 expressly amended section 496, subdivision (a), which criminalizes buying or receiving stolen property, but did not expressly amend section 496d, which more specifically criminalizes buying or receiving stolen motor vehicles, trailers, construction equipment or vessels.[3]

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[3] Section 496, subdivision (a) provides: "Every person who buys or receives *any property* that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the value of the property does not exceed nine hundred fifty dollars ($950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year, if such person has no prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290. [¶] A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property." (Italics added.)

Section 496d, subdivision (a) provides: "Every person who buys or receives *any motor vehicle*, as defined in Section 415 of the Vehicle Code, *any trailer*, as defined in Section 630 of the Vehicle Code, *any special construction equipment*, as defined in Section 565 of the Vehicle Code, *or any vessel*, as defined in Section 21 of the Harbors and Navigation Code, that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any motor

Proposition 47 also added section 490.2, subdivision (a), which provides that "[n]otwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290."

Pizana contends that notwithstanding the lack of express amendment to section 496d, Proposition 47 covers convictions under section 496d by virtue of the plain language in section 490.2 referring to "obtaining any property by theft …." (§ 490.2, subd. (a).) He also contends that voters intended to limit the prosecution of nonviolent thefts of property valued at $950 or less and treat those crimes as misdemeanors and, through poor drafting, may have inadvertently failed to expressly include or amend section 496d.

Pizana's argument was considered and rejected by the Court of Appeal in *People v. Varner* (2016) 3 Cal.App.5th 360 (*Varner*).[4] *People v. Bussey* (2018) 24 Cal.App.5th

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vehicle, trailer, special construction equipment, or vessel from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months or two or three years or a fine of not more than ten thousand dollars ($10,000), or both, or by imprisonment in a county jail not to exceed one year or a fine of not more than one thousand dollars ($1,000), or both." (Italics added.)

[4] The Supreme Court granted review in *Varner* on November 22, 2016, in case No. S237679. The matter was dismissed on August 9, 2017, following the court's decision in *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*).

1056, 1063[5] and *Orozco*, *supra*, 24 Cal.App.5th at p. 674 also rejected the argument that convictions under section 496d are eligible for relief pursuant to Proposition 47.

However, the First District Court of Appeal recently came to a different conclusion than *Varner*, *Bussey*, and *Orozco* and held that Proposition 47 affords relief to criminal defendants convicted of violating section 496d. (*People v. Williams* (2018) 23 Cal.App.5th 641, 651 (*Williams*).) We find *Williams* persuasive.

Proposition 47 Applies to Section 496d

The interpretation of a statute is a question of law and is subject to de novo review. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) Where the statute is clear and unambiguous, the plain meaning of the statute controls. (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265.) The interpretation of a voter initiative relies on "the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure." (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571; accord, *People v. Valencia* (2017) 3 Cal.5th 347, 357 (*Valencia*); *People v. Bunyard* (2017) 9 Cal.App.5th 1237, 1243.)

With these guidelines in mind, we turn to Proposition 47 and its application to section 496d offenses. (*Williams*, *supra*, 23 Cal.App.5th at p. 646.) As we previously noted, section 496d is not expressly listed in Proposition 47. However, theft crimes

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5 The Supreme Court granted review in *Bussey* on September 12, 2018, in case No. S250152.

involving property of a value of $950 or less have been held to come within the ambit of Proposition 47, even if the offenses are not expressly listed. (*People v. Page* (2017) 3 Cal.5th 1175, 1180; *Romanowski, supra,* 2 Cal.5th 903 at p. 910; *Williams, supra,* 23 Cal.App.5th at pp. 647–648.)

In *Romanowski,* the defendant had been convicted of violating section 484e, theft of access card information, which is not one of the offenses listed in Proposition 47. *Romanowski* concluded, there was "no reason to assume that reasonable voters seeking to anticipate the consequences of enacting Proposition 47 would have concluded that theft of access card information worth less than $950 is a serious or violent crime exempt from Proposition 47's reach." (*Romanowski, supra,* 2 Cal.5th at p. 909.) The Supreme Court had granted review in several cases holding Proposition 47 did not apply to section 496d convictions and remanded these cases after issuing its decision in *Romanowski*.[6]

Section 496d offenses are theft offenses to the same degree section 484e is a theft offense; both offenses are set forth in part 1, title 13, chapter 5, "Larceny," of the Penal Code. (*Williams, supra,* 23 Cal.App.5th at p. 649.) There is no "logical basis to distinguish between the receipt of stolen property and receipt of a stolen vehicle under Proposition 47." (*Ibid*.) As in *Romanowski*, "we see no reason to assume that a reasonable voter would conclude that receipt of a stolen vehicle worth less than $950 is a serious and violent crime outside the reach of Proposition 47 when receipt of any other form of stolen property is not." (*Williams, supra,* 23 Cal.App.5th at p. 649, citing *Romanowski, supra,* 2 Cal.5th at p. 909.)

The "overarching purpose of Proposition 47 was to reduce penalties for certain crimes and concomitantly to save costs to the state, where it is also determined by the court that reducing the crime and accompanying sentence will not create an unreasonable

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6 In addition to *Varner,* these cases include *People v. Nichols,* S233055; *People v. Garness,* S231031; and *People v. Peacock,* S230948; all remanded on August 9, 2017.

risk of danger to public safety." (*Williams*, *supra*, 23 Cal.App.5th at p. 650.) The Supreme Court's decisions in both *Page* and *Romanowski* demonstrate "that the language of Proposition 47 should be read broadly to effectuate the voters' intent." (*Williams*, *supra*, 23 Cal.App.5th at p. 650.) Our conclusion that section 496d offenses fall within the ambit of Proposition 47 effectuates the voter's intent.

Procedures on Remand

We have found no record evidence establishing the value of the motorcycle. We have concluded Proposition 47, however, requires the prosecution to prove the value of the vehicle, in this case a motorcycle, exceeded $950 in order to establish a felony violation of section 496d. (See *Williams*, *supra*, 23 Cal.App.5th at p. 651.) Proposition 47 was enacted in 2014; Pizana was convicted in March 2017. The cases issued by this court addressing Proposition 47 and section 496d previously had concluded Proposition 47 did not apply to section 496d.[7] Considering the cases issued by this court previously concluded Proposition 47 did not apply to section 496d, and the issue remains undecided by the Supreme Court with cases currently pending review, we decline to fault either the prosecutor or the trial court for failing to anticipate our decision in this case and produce evidence of the value of the motorcycle and instructions to the jury to find the value exceeded $950. (*People v. Gutierrez*, *supra*, 20 Cal.App.5th at p. 858.)[8]

Consequently, we will conditionally reverse the felony section 496d conviction and remand the matter. The prosecutor can accept a reduction of the section 496d

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[7] See, e.g., *People v. Rankin*, review granted May 1, 2019, S254154; *In re F.G.*, review granted April 17, 2019, S254005; *People v. Watkins* (Aug. 10, 2018, F072642) [nonpub. opn.]; *People v. Jones*, review granted October 10, 2018, S250907; *People v. Lepe*, review granted August 9, 2017, S240423.

[8] We acknowledge this court applied a different procedure in *In re D.N.* (2018) 19 Cal.App.5th 898, 903; however, the state of the law on the issue presented in that case was much more uncertain.

conviction to a misdemeanor and Pizana will be resentenced. Alternatively, the prosecutor may retry the section 496d count as a felony and produce evidence that the value of the motorcycle exceeded $950 at the time of the commission of the offense. (See *People v. Chiu* (2014) 59 Cal.4th 155, 168.)

Equal Protection Argument

Because we conclude Proposition 47 applies to section 496d offenses, we need not address Pizana's equal protection claim.

DISPOSITION

The felony conviction for a violation of section 496d is conditionally reversed and the matter is remanded for further proceedings. If the prosecution accepts a reduction of the section 496d offense to a misdemeanor, the verdict will be modified to so reflect and Pizana shall be resentenced. Alternatively, the prosecution may retry Pizana on a felony section 496d charge and shall be required to establish the value of the motorcycle exceeded $950 at the time of commission of the offense. In all other respects, the judgment is affirmed.

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FRANSON, Acting P.J.

I CONCUR:

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SMITH, J.

DESANTOS, J.

I respectfully dissent and would affirm the judgment. *People v. Williams* (2018) 23 Cal.App.5th 641, the case followed by the majority, extended the reasoning of *People v. Romanowski* (2017) 2 Cal.5th 903, to Penal Code section 496d.[1] The court in *Romanowski* held that Proposition 47 applied to section 484e. I am not persuaded that section 484e is analogous to section 496d. Section 484e expressly defined the offense as a "grand theft," making it clearly encompassed by the language of section 490.2.[2] In contrast, receiving stolen property is not, by definition, a theft. Theft under California law is an unlawful *taking*. (*People v. Page* (2017) 3 Cal.5th 1175, 1182; *People v. Gonzales* (2017) 2 Cal.5th 858, 864–865.) The crime of receiving stolen property has three elements: "(1) the property was stolen; (2) the defendant knew the property was stolen …; and, (3) the defendant had possession of the stolen property." (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425, disapproved on another ground in *People v. Covarrubias* (2016) 1 Cal.5th 838, 874, fn. 14.) Because the crime of receiving stolen property does not involve a *taking*, it is not a theft, and is not as clearly encompassed by section 490.2 as is section 484e.

Respectfully, I find the reasoning of *People v. Varner* (2016) 3 Cal.App.5th 360 (*Varner*) more persuasive. In *Varner*, the Fourth District Court of Appeal concluded that

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1 All further undesignated statutory references are to the Penal Code.

2 Section 490.2, subdivision (a) reads: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290."

section 490.2 did not apply to section 496d because Proposition 47 expressly amended the general receiving stolen property statute, section 496, subdivision (a), to classify a violation involving property valued at less than $950 as a misdemeanor where it was a wobbler before. As the *Varner* court stated, "If section 490.2 applied to receiving stolen property offenses, there would be no need to amend section 496." (*Varner*, at p. 367.) Because of this, I presume the Legislature did not intend section 490.2 to encompass section 496d. It follows since the Legislature did not expressly amend section 496d, as it did section 496, I find it did not intend a violation of section 496d involving a vehicle valued at less than $950 to be classified as a misdemeanor. The court in *Williams* did not address this legislative history. In my view, Proposition 47 does not apply to section 496d.

I likewise am not persuaded by appellant's equal protection argument. Appellant argues that treating a low-value vehicle theft as a misdemeanor while treating the offense of receiving the same low-value stolen vehicle as a felony violates his equal protection rights. I disagree. "[N]either the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.)

The difference in treatment between thieves and receivers of stolen property is easily rationalized. The provisions of criminalizing receiving stolen property reflect an intent to cut off the market in stolen goods on which criminal enterprises thrive. When a low-value vehicle is dismantled and its parts illicitly sold, that vehicle can be worth more than the same low-value vehicle as a whole. Thus, in some cases, the receipt is more serious than the theft. I would reject appellant's claim that his right to equal protection of the law is violated.

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DESANTOS, J.